

INTRODUCTION TO ADJUDICATION

19 May 2025

1. STATUTORY ADJUDICATION

Housing Grants, Construction and Regeneration Act 1996
("the Construction Act")

BASIC FEATURES OF THE ACT



RIGHT TO ADJUDICATE A
CONSTRUCTION CONTRACT



SETTLING DISPUTES ON AN INTERIM
BASIS



SCHEME FOR CONSTRUCTION
CONTRACTS (SCH 1) PROVIDES A
DEFAULT ADJUDICATION PROCEDURE

THE GATEWAY FOR ADJUDICATION – A ‘CONSTRUCTION CONTRACT’

- Section 104 – “construction contract” is an agreement for
 - Carrying out construction operations
 - Arranging for others to carry out construction operations
 - Providing labour for carrying out of construction operations
- Section 105(1) – defining “construction operations”
- Section 105(2) – setting out exclusions from construction operations

THE BOUNDARIES OF A CONSTRUCTION CONTRACT

- Includes

- Initial preparatory arrangements (s105(1)(e)), for example, bonds or business plans: *Equitix ESI CHP v Generacion UK Ltd* [2018] EWHC 177 (TCC).
- Contracts of engagement with architects, engineers, project managers, and quantity surveyors can be adjudicated, even in connection with early preparatory work if:
 "sufficient nexus between the advisory, calculation or initial design work and subsequent construction operations": *Ove Arup v Coleman Bennett International Consultancy Plc* [2019] EWHC 413 (TCC) per O'Farrell J.

- Excludes

- Operations at 105(2), including oil & gas drilling, extraction of minerals, some manufacture and delivery operations
- Most collateral warranties: *Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP* [2024] UKSC 23.

GATEWAY – THE ‘DISPUTE’ MUST HAVE CRYSTALLISED

1. Mere fact one party notifies the other party of a claim does not automatically and immediately give rise to a dispute
2. Dispute does not arise until it emerges that the claim is not admitted.
3. Period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily on the facts of the case and contractual structure.
4. A deadline imposed by a claimant for a response, does not automatically curtail what would be a reasonable time to respond.

THE PROCESS OF ADJUDICATION

1. Notice of intention to refer a dispute to adjudication is served.
2. The Adjudicator is selected and appointed.
3. Challenge to the adjudicator's jurisdiction to decide the dispute (if any).
4. Referral notice is served.
5. Reply, rejoinder and other submissions are served.
6. Adjudicator issues their decision.

1. THE NOTICE OF INTENTION TO REFER A DISPUTE TO ADJUDICATION ("ADJUDICATION NOTICE")

- Should clearly identify:
 - The nature and brief description of the dispute and of the parties;
 - Details of where and when the dispute has arisen;
 - The nature of the redress sought; and
 - Names and addresses of the parties to the construction contract.
- If the dispute is widely defined, likely to leave it open to the respondent to raise any reasonable argument in defence and any errors in the identification of the dispute cannot be corrected in the referral notice: *KNS Industrial services (Birmingham) Ltd v Sindall Ltd* (2001) 17 Const LJ 170

2. NOMINATING AND APPOINTING THE ADJUDICATOR

- Any express agreement as to the identity of the adjudicator or the identity of a body to appoint the adjudicator prevails over the Scheme.
- If no agreement is reached and the contract does not provide for how the adjudicator should be nominated, then the Claimant may apply to any adjudicator nominating body to nominate.
- If the nominating body appoints someone unsuitable, then the party that serves the adjudication notice can let it expire by not serving the referral notice.

3. CHALLENGING THE ADJUDICATOR'S JURISDICTION

- Adjudicator has no jurisdiction to decide his/her own jurisdiction.
- The party challenging wishes to maintain its challenge then it should expressly do so, in clear terms, at the first available opportunity.
- If this position on jurisdiction is not so reserved and then the adjudication proceeds, it will be taken to have waived jurisdiction objections.
- There can be an implied agreement as to jurisdiction.

WHAT CAN THE ADJUDICATOR DO IN RESPONSE?

- If an arguable case that the adjudicator has jurisdiction, then should continue until a court determines otherwise.
- If the adjudicator finds they have no jurisdiction, or that they are unable to decide on the basis of the available facts, they must resign.

4. THE REFERRAL NOTICE

- Should refer to:
 - The key parts of the contract and highlight the relevance to the claim;
 - Relevant legal authorities and explain how those are relevant to the claim;
 - Documents(correspondence, minutes, notes, photos etc.) and explain how these are relevant to the claim;
 - Witness statements and/or expert reports (if produced).
 - The same redress as contained within the adjudication notice.
- All the supporting material (e.g. witness statements, expert reports etc.) should be served with the referral.

5. THE RESPONSE/REPLY

- Response must be prepared within the timetable set by the adjudicator, sometimes within 7 days of the referral notice.
- Requests for this to be extended to 14 days are usually agreed.

6. THE DECISION

- Must be delivered within 28 days of service of the referral notice. Can be extended by a further 14 days, if the referring party agrees.
- Binding provided not challenged by subsequent arbitration or litigation.

ADJUDICATION – HANDY RESOURCES

- *Wilmot-Smith on Construction Contracts* (4th Edn), Chapter 19 by David Sawtell.
- *Coulson on Adjudication* (4th Edn), Chapters 2, 3, and 7.

ADJUDICATION & CURVEBALLS

GETTING STARTED

- Has a dispute crystallised?
 - *AMEC Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291*
 - *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC)*
 - *Beck Interiors Ltd v UK Flooring Contractors Ltd* [2012] EWHC 1808 (TCC)
 - *BDW Trading Ltd v Ardmore Construction Ltd* [2024] EWHC 3235 (TCC)

GETTING STARTED

- Is any notified sum outstanding?
 - *S&T (UK) Limited v Grove Developments Limited* [2018] EWCA Civ 2448*
 - *Henry Construction Projects Ltd v Alu-Fix (UK) Ltd* [2023] EWHC 2010 (TCC)
 - *Lidl Great Britain Ltd v Closed Circuit Cooling Ltd* [2023] EWHC 3051 (TCC)

ADJUDICATION

- Are there one or two (or more...) disputes?
 - *Bellway Homes Ltd v Surgo Construction Ltd* [2024] EWHC 10 (TCC)

ADJUDICATION

- What can be included in adjudication:
 - DPA claims: *BDW Trading Ltd v Ardmore Construction Ltd* [2024] EWHC 3235
- What can't be included?
 - Equitable remedies (but see *ISG Retail Ltd v Castletech Construction Ltd* [2015] EWHC 1443 (TCC))
 - Misrepresentation

ANTICIPATING NATURAL JUSTICE CHALLENGE

- Is there a breach of natural justice by reason of volume of data/time constraints, whether for the adjudicator or the parties?
 - *Home Group Ltd v MPS Housing Ltd* [2023] EWHC 1946 (TCC)

ANTICIPATING JURISDICTIONAL CHALLENGE

- Reserving jurisdiction rights... across multiple adjudications?
 - *Bresco Electrical Services Ltd (in Liquidation) v Michael J Lonsdale (Electrical) Ltd, Cannon Corporate Ltd v Primus Build Ltd* [2019] EWCA Civ 27*
 - *Bexheat Limited v Essex Services Group Limited* [2022] EWHC 936 (TCC)

2. ENFORCEMENT OF ADJUDICATION

NEED FOR ENFORCEMENT

- Construction Act does not provide for enforcement of an adjudicator's decision
- TCC developed a procedure, essentially an issue of a Part 7 claim and simultaneous application for expedited summary judgement under Part 24, set out at Section 9 of the TCC Guide

APPLICATION FOR ENFORCEMENT

- “Paper without notice adjudication enforcement claim and application for the urgent attention of a TCC judge”
 - Issue of Part 7 Claim
 - Claims of less than £100,000 should be commenced in the County Court
 - Claims of less than £1million may be transferred by the TCC to the County Court at Central London
 - Application for summary judgment (Part 24)
 - Application to abridge time in which defendant should file an acknowledgement of service (usually four days)

APPLICATION FOR ENFORCEMENT CTD.

- Directions given within 3 days of receipt of application notice
- No defence necessary (per Part 24)
- Grounds for resisting enforcement set out in defendant's witness statements
- Return date for hearing: usually 6-8 weeks

USE OF PART 8 TO CHALLENGE OR SUPPORT DECISION

- Expedited hearing of Part 8 claim for declaratory relief if:
 - proceedings do not involve a substantial dispute of fact; and
 - no monetary judgment is sought
- Section 9.4.1

“the TCC will also hear any applications for declaratory relief arising out of the commencement of a disputed adjudication”
- May be heard at the same time as a hearing of an application to enforce under Part 7

PRINCIPLES OF ENFORCEMENT

- Adjudication decisions should be enforced
- The process is intended to provide “rough justice”, and mistakes and injustices may not prevent enforcement: *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] EWHC Technology 254
- Adjudicator must answer the right question, but even if mistaken in that conclusion, the decision will be enforced: *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2000] EWCA Civ 507
- Principles of enforcement confirmed: Jackson J in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWHC 778 (TCC); *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358

GROUNDS TO RESIST ENFORCEMENT

- Did adjudicator lack jurisdiction?
 - If so, was a challenge to jurisdiction raised at the earliest possible moment?
- Did the adjudicator breach the rules of natural justice?
- If the decision should be enforced, are there grounds for a stay of execution?
(*Wimbledon Construction Co 2000 Ltd v Vago* [2005] EWHC 1086 (TCC))

ADJUDICATION ENFORCEMENT – CURVEBALLS

DISCUSSION POINT: PART 8

- How common is it to use Part 8? What are the pitfalls?
 - *ISG Retail Ltd v FK Construction Ltd* [2024] EWHC 878 (TCC)
 - *TClarke Contracting Ltd v Bell Build Ltd* [2024] EWHC 992 (TCC)
 - *Victory House General Partner Ltd v RGB P&C Ltd* [2018] EWHC 102 (TCC)
 - *Merit Holdings Ltd v Michael J Lonsdale Ltd* [2017] EWHC 2450 (TCC)
 - *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC)

DISCUSSION POINT: NATURAL JUSTICE

- Do natural justice challenges ever succeed?
 - *BDW Trading Limited v Ardmore Construction Limited* [2024] EWHC 3235 (TCC)
 - *Home Group Ltd v MPS Housing Ltd* [2023] EWHC 1946 (TCC)
 - *Dorchester Hotel Ltd v Vivid Interiors Ltd* [2009] EWHC 70 (TCC)

DISCUSSION POINT: SERIAL ADJUDICATIONS

- What, if anything, can be done to restrain serial adjudications?
 - *Beck Interiors Ltd v Eros Ltd* [2024] EWHC 2084 (TCC)

DISCUSSION POINT: PART 36 OFFERS ON ADJUDICATION ENFORCEMENT

- Can an enforcing party protect itself in costs via a Part 36 offer? What are the pitfalls?
 - *Sleaford Building Services Ltd v Isoplus Piping Systems Ltd* [2023] EWHC 1643 (TCC)

DISCUSSION POINTS: THE ADJUDICATOR'S FEES

- Can an adjudicator's decision on fees be overturned by the court?
 - *A&V Building Solution Ltd v J&B Hopkins Ltd* [2024] EWHC 2295 (TCC)

3. INSOLVENCY ISSUES

DISCUSSION POINT: INSOLVENT PARTY'S ABILITY TO REFER DISPUTE TO ADJUDICATION

- Can an insolvent party refer a dispute to adjudication?
 - *Rule 14.25 of the Insolvency (England and Wales) Rules 2016 (SI 2016/1024)*
 - *Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd (In Liquidation) [2018] EWHC 2043 (TCC)*
 - *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd [2019] EWCA Civ 27*
 - *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25*

DISCUSSION POINT: ENFORCEMENT OF ADJUDICATION IN FAVOUR OF INSOLVENT PARTY

- When will the Court exercise its discretion to enforce an adjudicator's decision in favour of the insolvent party?

Liquidation

- *Meadowside Building Developments Ltd (In Liquidation) v 12-18 Hill Street Management Co Ltd* [2019] EWHC 2651 (TCC)
- *Balfour Beatty Civil Engineering Ltd v Astec Projects Ltd (In Liquidation)* [2020] EWHC 796 (TCC)
- *John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd* [2020] EWHC 2451 (TCC); [2021] EWCA Civ 1452

DISCUSSION POINT: ENFORCEMENT OF ADJUDICATION IN FAVOUR OF INSOLVENT PARTY

- When will the Court exercise its discretion to enforce an adjudicator's decision in favour of the insolvent party?

Administration

- *Styles & Wood Ltd (in administration) v GE CIF Trustees Ltd* (unreported), 4 September 2020
- *JA Ball Ltd (in administration) v St Philips Homes (Courthaulds) Ltd* (unreported), 3 February 2023 (TCC)
- *Malin Industrial Concrete Floors Ltd v Volkerfitzpatrick Ltd* [2024] EWHC 2890 (TCC)

DISCUSSION POINT: STAY OF EXECUTION OF ENFORCEMENT PROCEEDINGS

- When will the Court exercise its discretion to order a stay of execution of the enforcement of an adjudicator's decision?
 - ***CPR 83.7(1) and CPR 83.7(4)***
 - *Wimbledon Construction Co 2000 Ltd v Vago* [2005] EWHC 1086 (TCC)
 - *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] EWHC 227 (TCC); [2018] EWCA Civ 2695
 - *Breyer Group Plc Ltd v Adam Michael Scaffolding Services* [2018] EWHC 3959 (TCC)
 - *Grandlane Developments Ltd v Skymist Holdings Ltd* [2019] EWHC 747 (TCC)
 - *Noble Construction Ltd v Wilson* [2019] EWHC 1907 (TCC)
 - *Quadro Services Ltd v FP McCann Ltd* [2021] EWHC 1490 (TCC)

DISCUSSION POINT: STAY OF EXECUTION OF ENFORCEMENT PROCEEDINGS

- What evidence is required to assess the Claimant's financial position?
 - *Farrelly (M&E) Building Services Ltd v Byrne Brothers (Formwork) Ltd* [2013] EWHC 1186 (TCC)
 - *BN Rendering Ltd v Everwarm Ltd* [2018] EWHC 2356 (TCC)
 - *Bexheat Ltd v Essex Services Group Ltd* [2022] EWHC 936 (TCC)
 - *Complete Ceiling and Partitioning Systems Ltd v DE1 Ltd* [2024] EWHC 2800 (TCC)

DISCUSSION POINT: INSOLVENCY – THINKING OUTSIDE THE BOX

- What are the alternatives to bringing claims against insolvent parties?
 - Applicable party to the Contract: *Estor Limited v Multifit (UK) Limited* [2009] EWHC 2565 (TCC); *Hamid v Francis Bradshaw Partnership* [2013] EWCA Civ 47.
 - Implied Novation: *Capita ATL Pension Trustees Ltd v Sedgwick Financial Services Limited* [2016] EWHC 214 (Ch); *Rolls-Royce Holdings Plc v Goodrich Corp* [2023] EWHC 1637 (Comm) *Magee v Crocker* [2024] EWHC 1723 (Ch).
 - Assignment: s.136 LPA 1925; *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1969] 1 Q.B. 607, 615.
 - Parent Company Guarantee: *Liberty Mercian Ltd v Cuddy Civil Engineering* [2013] EWHC 2688 (TCC)

WORKSHOP QUESTION